No. [illegible]

SEP 10

IN THE SUPREME COURT OF THE UNITED STATES

BEN BABE SHARGAA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari be issued to review the Order of the Supreme Court of the State of Florida entered upon the denial, on June 11, 1958, of the Petitioner's Petition for Rehearing of Petitioner's appeal, which dehial confirmed that certain judgment and opinion of the Supreme Court of the State of Florida entered on April 30, 1958, affirming the judgment of conviction pursuant to a jury verdict finding him guilty of being a second offender under Sec. 775.09 of the Florida Statutes; also to review the said Judgment and Opinion of April 30, 1958.

OPINIONS BELOW

The Opinion and Judgment of the Supreme Court of the State of Florida was filed on April 30, 1958, and reported in 102 So. 2d 809; rehearing denied June 11, 1958 and reported in 102 So. 2d 814. The Judgment of the Criminal Court of Record in and for Broward County was entered on the 20th of March, 1956. A copy of the Opinion and Judgment of the Supreme Court of Florida is appended to this Petition.

GROUNDS ON WHICH JURISDICTION IS INVOLVED

The date of the entry of the Order to be reviewed is June 11, 1958 and includes the Judgment and Opinion of April 30, 1958. On said June 11, 1958, the Court entered its Order Denying the Petitioner's Petition for Rehearing of its Opinion and Judgment duly entered on April 30, 1958. On June 16, 1958, the Florida Supreme Court ordered that the execution and enforcement of the Judgment of the Court filed on April 30, 1958, be stayed for sixty days to enable the Petitioner to file this Petition for Writ of Certiorari. On August 13, 1958, another order was entered granting an additional thirty days.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the Decree in question by a Writ of Certiorari is the United States Code, Title 28, Section 1257(3).

QUESTION PRESENTED FOR REVIEW

The fundamental question presented in this Petition

is whether the Defendant was denied a fair and impartial trial where the Court permitted the prosecuting attorney, known as the County Solicitor, who actively conducted the entire trial, to testify as a witness when no necessity therefore was shown.

It is the contention of the Petitioner that he has been denied the privileges and immunities afforded all United States citizens under the United States Constitution, Article 4, Section 2, Clause 1, and Amendment XIV, Section 1:

> "**Article IV, Section 2, Clause 1**—The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> "**Amendment XIV, Section 1**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Furthermore, the Petitioner's right to a fair and impartial public trial, guaranteed to him and all other citizens by Article 3, Section 2, Clause 3, and by Amendment VI:

"**Article III, Section 2, Clause 3**—The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

"**Amendment (VI)**—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;"

has been denied to the Petitioner by the action of the Prosecuting Attorney in being a witness against the Petitioner.

STATEMENT OF THE CASE

The State of Florida filed an amended information in the Criminal Court of Record of Broward County, Florida, charging the Petitioner, herein sometimes referred to as the Defendant, with having been twice convicted of a felony contrary to the provisions of Section 775.09 (R. 8, 9), of the Florida Statutes. A Motion to Quash was denied, and upon arraignment, the Defendant standing mute, the Court then entered a plea of not guilty

on behalf of the Petitioner. A trial by jury followed. The Prosecuting Attorney, after taking the Rule (R. 15) testified as a witness for the prosecution (R. 17, 18, etc.). The Defendant's Counsel vigorously protested (R. 10, 11, 16, 28, 52).

From the first moment that the Defendant's attorneys were apprised of the fact that the Prosecuting Attorney intended being a witness, they protested vigorously (R. 10, 11). Mr. Yocom, in behalf of the Defendant, made a formal objection for the record (R. 16). He cited as grounds the fact that the Prosecuting Attorney had already started the conduct of the trial, selected the jury, and signed the Information. He also stated that it is against the Canons of Ethics and the Rules of the Court for a prosecutor to be a witness in a case that he is prosecuting.

The Court overruled the Objection (R. 16).

After the Prosecuting Attorney had testified, and left the Courtroom, the Defendant objected, on the same grounds as before, to the said witness, with the Rule in effect, coming back into the Courtroom to take up once again the conduct of the prosecution (R. 28).

The Court overruled the objection (R. 28). A similar objection and court ruling were subsequently made as well (R. 52).

At the conclusion of the State's case, the Petitioner moved for a directed verdict of acquittal (R. 136) upon grounds which included the following:

"4. The County Solicitor, Emerson Allsworth, after conducting a trial of the cause, over the objections of the defense, was sworn as a witness for the State, was examined on direct examination by his own Assistant County Solicitor, after being placed under the rule, and thereafter re-entered the Courtroom and resumed his place at the prosecutor's table and assisted in the further prosecution of the case. (R. 137)."

This Motion was denied (R. 137). The Defendant offered no testimony. The jury returned a verdict of guilty (R. 185), and the Court immediately adjudged the Defendant guilty, and sentenced him to be confined in the State Prison at hard labor for eight (8) years (R. 186).

An Amended Motion for New Trial was seasonably filed (R. 190, 191), and on April 3, 1956, the said Motion was denied (R. 187). The Petitioner filed his Notice of Appeal to the Supreme Court of Florida on April 3, 1956, it being an appeal from the said Judgment, Sentence and Order denying a new trial (R. 193). The Florida Supreme Court affirmed the Judgment of conviction.

The Defendant, in his Amended Motion for a New Trial, again raised the objection to the Prosecuting Attorney having been permitted to testify as a witness, the grounds of the said objection being the same as before (R. 190).

In addition as an additional ground for a New Trial, the Defendant alleged that the verdict was contrary to the law, contrary to the evidence and contrary to the law and the evidence.

Without clarification or reference to any particular ground cited in the Amended Motion for a New Trial, the Court denied the said Amended Motion (R. 192).

In connection with his Appeal to the Florida Supreme Court, the Defendant filed his Assignments of Error on September 19, 1956 (R. 197, 198). Among others, the Defendant listed:

> "1—The Court erred in permitting, over the objections of the Defendant, Emerson Allsworth as County Solicitor to testify as a witness in the case in which he was the prosecutor (R. 197) . . .
>
> 7—The Court erred in allowing the verdict to stand, which verdict was contrary to the law (R. 198) . . .
>
> 10—The statute under which the Defendant was charged and convicted denies to the Defendant the constitutional guarantees of both the State of Florida and the Federal Constitution of due process of law (R. 198) . . .
>
> 12—The Judgment and sentence is contrary to the law and the evidence (R. 198) . . . "

In his appellants brief, and his reply brief filed with the Florida Supreme Court, the Defendant vigorously raised, and argued, the questions with reference to the privileges, rights and immunities granted to him by the Florida Constitution, and the United States Constitution and in particular his right to a fair, impartial and public

trial. He contended that the action of the prosecuting attorney in being a witness prejudiced the jury against the Defendant.

As set forth verbatim in his brief, the Petitioner raised, among others this point:

> "Was the Defendant denied a fair and impartial trial where the Court permitted the Prosecuting Attorney, who actively conducted entire trial, to testify as a witness when no necessity therefore was shown?"

The Petitioner contended that the Prosecuting Attorney (The County Solicitor) testified on material points, after being put under the "Rule" (R. 15) i.e. that witnesses are excluded from the Courtroom until called to testify, and they are not permitted to discuss the case with anyone, except the attorneys. Then after testifying, the County Solicitor did not actually leave the Courtroom, but continued to conduct the trial (R. 28). The Petitioner objected to the County Solicitor conducting the trial, after having so testified, and thus violating the "Rule". The Lower Court overruled the objection (R. 28).

The Petitioner contended that his constitutional rights to a fair and impartial trial were denied him by such conduct of the Prosecuting Attorney. These rights are guaranteed by, among others, Section 11 of the Declaration of Rights of the Florida Constitution and the 14th Amendment to the Constitution of the United States.

The Supreme Court of Florida, held, in its opinion and judgment, entered on April 30, 1958, that the practice

of acting as prosecutor and witness is not to be approved and should be indulged in only under exceptional circumstances. However, in this particular case, it held that such practice did not result in any substantial harm to the Petitioner. It consequently affirmed the Lower Court verdict and judgment.

In its opinion, the Court did not go into the matter of the Petitioner's rights, privileges and immunities, guaranteed by the United States Constitution and the Florida Constitution, being violated by the Prosecuting Attorney in the manner set forth in the Defendant's appeal brief to the Florida Supreme Court.

REASONS FOR ALLOWANCE OF WRIT

A Second Felony Offender Statute is an arbitrary and harsh law. It is intended for the good of the general public. However, it should never be used in such fashion as to constitute a persecution, rather than a prosecution, of a citizen. It should never be used to deprive the private citizen of his liberty, or property, without due process of law; nor is it proper to deny him the equal protection of the laws.

The State contended that the Petitioner was convicted in 1942 on a bad check charge and convicted on another bad check charge in 1954. Each conviction constituted a felony, even though the total sum of all checks involved in both convictions amounted to less than $200.00. The Petitioner received a jail sentence of eight (8) years under the Second Felony Offender Statute.

In the case of Bennett vs. Commonwealth, a Kentucky case, reported 28 S.W. 2d 24, the Court of Appeals of Kentucky, speaking through Justice C. Stanley stated as follows:

> "It has often been written that a Prosecuting Attorney should act impartially and see that justice is fairly meted out, which requires fair dealing with an accused in calling him to account for his crime. *It is his duty to see that the legal rights of the accused, as well as those of the Commonwealth, are fully protected; to prosecute and not persecute; to conduct himself with due regard to the proprieties of the office.* He represents the people of the State, and in a degree should look after the rights of a person accused of a crime by endeavoring to protect the innocent and seeing that truth and right shall prevail." (italics supplied).

It is the contention of the Petitioner that there was no need for the County Solicitor to act as the Prosecuting Attorney. He had a capable assistant. Knowing that he was going to be a witness, he should not have conducted the trial as the Prosecuting Attorney. In Civil Matters, the Canons of Ethics that bind an attorney require him to withdraw from a case, if he should find that he is going to be a witness in such case. It should apply equally as well in a Criminal prosecution.

There has been no decision by the United States Supreme Court on the question of the propriety of a Prose-

cuting Attorney being a witness against a Defendant while still remaining as the prosecutor. There has been no decision in such a case protecting a Defendant from the loss of his rights, privileges and immunities guaranteed by the United States Constitution, and particularly his right to a fair and impartial trial.

The highest United States Court decision on this point was handed down by the Eighth Circuit Court of Appeals in 1928, in the case of **Robinson vs. United States 32 F. (2d) 505:**

> "No hard and fast rule can be laid down as to when it is permissible for a Prosecuting Attorney to become a witness against a defendant and remain as prosecutor. Circumstances might arise in the trial of a case making it necessary that the Prosecuting Attorney or his assistant become a witness, but these cases are few and exceptional. The function of a Prosecuting Attorney and a witness should be disassociated. *A jury naturally gives to the evidence of the Prosecuting Attorney far greater weight than to that of the ordinary witness.* Circumstances might exist where the prosecutor could not withdraw from the case. He might be the only attorney familiar with the case and the only one engaged in the prosecution. *The tendency of a situation where a prosecutor in a criminal case becomes a witness for the government is to prevent somewhat that fair trial to which a defendant is entitled.* If this were the only question in the case, it might not be sufficient to warrant a reversal, but the

practice of acting as prosecutor and witness is not to be approved, and should not be indulged in, except under most extraordinary circumstances." (italics supplied)

There must be a decision by the Highest Court in the land to guide Prosecuting Attorneys and to be a beacon light in Criminal prosecutions of this type with regard to protecting the Defendant in Criminal prosecutions, preserving their rights, privileges, immunities, and rights guaranteed to them by the United States Constitution. Leaving the law uncertain on the question of the Prosecuting Attorney acting as a witness, will result in gross injustice. This must be avoided. There should be prosecution and not persecution.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Florida should be granted.

L. J. CUSHMAN
Attorney for Petitioner
706 Ainsley Building
Miami 32, Florida

I HEREBY CERTIFY THAT a copy of the above and foregoing was mailed on this day of September, 1958, to each of the following: Honorable Guyte P. McCord, Clerk, Supreme Court, Tallahassee, Fla.; Honorable Richard W. Ervin, Attorney General, State of Florida, Tallahassee, Fla.

L. J. CUSHMAN
Attorney for Petitioner

APPENDIX

BOOK 18 PAGE 40

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A. D. 1958

CASE NO. 29,190

BEN BABE SHARGAA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Opinion filed April 30, 1958.

An Appeal from the Criminal Court of Record for Broward County, W. T. Kennedy, Judge

J. B. Patterson, for Appellant

Richard W. Ervin, Attorney General and David U. Tumin, Assistant Attorney General, for Appellee

THORNAL, J.

Appellant Shargaa, who was defendant below, seeks reversal of the judgment of conviction pursuant to a jury verdict finding him guilty of being a second offender under Section 775.09, Florida Statutes.

The principal point involved is whether there was adequate evidence of prior conviction of a felony.

The information filed February 22, 1956, charged Shargaa with conviction of a felony in the Criminal Court of Record of Polk County on March 17, 1942. It further charged that he was convicted of a subsequent felony in the Criminal Court of Record of Broward County on September 28, 1954. The first felony consisted of the issuing and passing of a worthless check in the amount of $53.25. The second felony consisted of the issuing and passing of a worthless check in the amount of $100.00. See Shargaa v. State, Fla. 1955, 84 So.2d 42.

For the first offense Shargaa had been placed on probation for one year. For the second offense he was sentenced to serve three months in the county jail. Following his conviction as a second offender pursuant to the information filed in this cause Shargaa was adjudged guilty and sentenced to serve eight years in the state prison.

To establish conviction of the first felony, the State produced the original court file in Case No. 8564 in the Criminal Court of Record of Polk County. The entire file was placed in evidence. The entry in the Minute Book of the Polk County Criminal Court of Record purporting to reflect the judgment rendered by the Judge read as follows:

"STATE OF FLORIDA
VS
B. SHARGAA

No. 8561 ISSUING WORTHLESS CHECK

"The defendant in the above entitled cause appearing this day in open court and being duly

> arraigned, did then and there freely and voluntarily plead guilty to the Information filed in this cause. Whereupon the Court defers the passing of sentence, during said defendant's good bahaviour and said cause is referred to T. D. Dodge, Parole Supervisor of Miami, Florida
>
> "THIS March 17, A.D. 1942"

There was no other Minute Book evidence of a judgment of conviction. However, the records in the case as reflected by the court file contained an "ORDER OF PROBATION" signed by the Judge of the Polk County Criminal Court of Record on March 17, 1942. After stating the style and number of the case (8564), the last mentioned order contained, among other provisions, the following:

> "THIS CAUSE coming on to be heard, and being heard at the January Term of the aforesaid Court, before the Honorable Robert T. Dewell, Judge, and the above named defendant having: ENTERED A PLEA OF GUILTY TO THE OFFENSE OF Issuing Worthless Check
>
> "The Court does hereby adjudge you to be guilty of the crime for which you have PLED GUILTY."

The order then suspends the imposition of sentence and places the defendant on probation under supervision of the Florida Parole Commission for a period of one year. This same order further directed the Clerk of the Court to file the order in his office and "enter a copy of same in the Minutes of the Court."

Apparently the Clerk neglected to make formal entry of the Order of Probation in the Minute Book of the Court.

There was further filed in evidence in the instant case an order terminating the probation prescribed by the above mentioned "Order of Probation". The order terminating the probation was incorporated in the Minutes of the Polk County Criminal Court of Record.

At the trial of the instant case the appellant objected to the introduction of the "Order of Probation" because it had not been formally incorporated in the Minutes of the Court. His objection was overruled. When the State completed the introduction of its evidence, appellant moved for a directed verdict on the ground that there had been no legal proof of a conviction of the first felony. His motion was denied. The jury found him guilty and the judgment and sentence which we have noted were prescribed. Reversal of this judgment is now sought.

It is the contention of the appellant that the entry in the Minute Book of the Criminal Court of Record of Polk County was not a judgment of conviction and that the Order of Probation which was not formally entered in the Minute Book could not be employed as evidence of the prior conviction.

It is the contention of the State that the Order of Probation contained a formal adjudication of guilt and that the failure of the Clerk to enter the Order in the Minute Book did not invalidate the formal order of the court as evidence of the court's judgment.

Appellant refers us to Section 921.02, Florida Statutes, which reads as follows:

> "If the defendant has been convicted, a judgment of guilty, and if he has been acquitted, a judgment of not guilty, shall be rendered in open court and entered on the minutes of the court."

He points out that this statute requires that the judgment of the court in a criminal proceeding be "entered on the minutes of the court." He then insists that a failure to enter the judgment formally in the Court Minutes deprives the judgment of any validity as evidence of conviction.

At the outset we will dispose of the purported adjudication of guilt actually appearing in the Court Minutes and quoted in the forepart of this opinion. In regard to this item of evidence we are compelled to conclude that the Minute entry constituted no judgment or adjudication of guilt. Reference to the quoted entry will reveal that the judge did not formally adjudge the defendant guilty. It merely recited that the defendant had pleaded guilty and that the court "defers the passing of sentence" during good behaviour. Formal judgment of guilt is essential to support a subsequent sentence or suspension of imposition of sentence accompanied by probation. The Minute entry here involved fails to meet the requirements of our own decisions. Mathis v. State, 67 Fla. 277, 61 So. 944. The State in the instant case must therefore rely on the "Order of Probation" as evidence of the prior conviction.

It will be recalled that the Order of Probation did

contain a formal adjudication of guilt. It specifically stated "The Court does hereby adjudge you to be guilty of the crime for which you have PLED GUILTY." There is no objection to combining the adjudication of guilt with the Order of Probation.

Customarily the judgment of guilt in a criminal case combines the formal adjudication of guilt with the prescription of the sentence. Similarly, if the imposition of sentence is to be suspended and probation prescribed, it is proper to include in the one order the formal adjudication of guilt and the prescription of probation.

The State here seems to take the position that the fact that the defendant was placed on probation in and of itself is evidence of his prior conviction. On this point we must disagree. It is the responsibility of the prosecution in a second offender proceeding to prove the prior conviction by competent evidence. This includes a proper showing that the accused was previously adjudged guilty of a felony by a Court of competent jurisdiction. In proceedings of this nature the existence of the prior conviction, however, is a fact to be proved as any other fact. The nature of the proof has varied in different jurisdictions. In some instances the docket entries in the Clerk's office have been considered adequate. We have the view that the official records of the court in which the accused was convicted should be produced and filed in evidence in the second offender proceeding. See Underhill's Criminal Evidence, 5th ed., Sec. 222; Wharton's Criminal Evidence, 12th ed., Vol. 2, Sec. 645.

The appellant here insists that an "entered" judgment of conviction is essential to support a subsequent

sentence. To sustain his position, he points to our opinions in Ellis v. State, 100 Fla. 27, 129 So. 106, 69 ALR 783; and Wade v. Coniers, 92 Fla. 494, 109 So. 453. It is true that in the Ellis case we held that an adjudication of guilt will not on direct attack be implied from the mere imposition of sentence. In that case we also quoted from Section 49 of Freeman on Judgments, wherein it is stated that a court speaks through its journal and that a judgment is not "rendered" until reduced to a journal entry. However, we also cited the same author as authority for the proposition that the failure of the Clerk to enter a Minute of the judgment does not affect the validity of the judgment.

In Wade v. Coniers, supra, we held that a commitment issued by the Clerk of a Court had no validity unless it was supported by a formally entered judgment. A careful examination of this case will reveal that there was no evidence whatever of a judgment of guilt. It was pointed out that the Minutes contained no record of the judgment or sentence. We further recited that it appeared "that there was no record of any order or judgment made by the court."

In the instant case the State produced and filed in evidence the original judgment signed by the trial judge. We think it well to caution that we are not here dealing with related problems such as the date from which an appeal period is measured. On the other hand, we are here concerned with the question of the validity of the prior judgment in view of the failure of the Clerk to enter it in the Court Minutes despite the fact that the actual original judgment was in the official court records and filed in the case. We think we are here justified in

applying what appears to be the established rule in civil cases which is to the effect that as between the parties the validity of a judgment is not affected by the failure of the Clerk of the Court to note the judgment in the Minute Book. 30A Am.Jur., Judgments, Sec. 97, p.228. We ourselves have applied this rule. Berkenfield v. Jacobs Fla. 1955, 83 So.2d 265.

In regard to the "Order of Probation" which contained the adjudication of guilt by the Judge of the Criminal Court of Record of Polk County, we find that it constituted a part of the official records of that court and when offered in evidence in the instant case was sufficient to establish a judgment of conviction of the prior felony. While the failure of the Clerk to make a Minute entry of the judgment may have constituted a clerical misprision, and while we have the view that orderly record keeping would dictate that the entry in each instance be made as required by the statute cited, we also feel that when the original judgment itself is available, it can be properly used as evidence despite the lack of the Minute entry. We could analogize the situation to an application of the best evidence rule. The entry in the Minute Books would be the best evidence but absent such an entry, the original judgment itself becomes the best evidence and it is admissible to prove its contents. This leads us to the conclusion that the trial judge in the instant case committed no error when he denied the appellant's motion for a directed verdict.

To avoid any suspicion that we might have overlooked the point, we now discuss briefly the contention of the appellant that error was committed in permitting the County Solicitor to testify as a witness and then subse-

quently engage actively in the prosecution of the case. The County Solicitor was the State's first witness. His testimony was to establish the fact that the appellant was the same person whom he prosecuted for commission of the second felony described in the information. Upon completing his testimony, he took his place at the counsel table and engaged actively in prosecuting the case. While we agree with the observations made in Robinson v. United States (1928), CCA 8th, 32 F.2d 505, cited by appellant to the effect that the practice of acting as prosecutor and witness is not to be approved and should be indulged in only under exceptional circumstances, we do not feel that in this instance it resulted in any substantial harm to the appellant. It was obvious that the only purpose of the County Solicitor's testimony was to identify the appellant.

We have the view that the better practice would be for a prosecuting officer who becomes a witness to withdraw from the actual prosecution of the cause. This is so because a jury is naturally apt to give to the testimony of the prosecuting attorney himself much more weight than it would accord to the ordinary witness. In the instant case, however, there was no conflict whatever on the testimony given by the County Solicitor. Despite what we have recommended as the better practice, we fail to find that harmful error resulted from what occurred in the instant case.

The judgment is AFFIRMED.

TERRELL, C.J., ROBERTS, DREW and O'CONNELL, JJ., concur

STATE OF FLORIDA, BROWARD COUNTY

This instrument filed for record
16th day of June, 1958
and recorded MINUTES CRIMINAL COURT
18 page 39-47 Record Verified.

W. E. BUNCH, JR. Clerk

by s/ W. E. Bunch, Jr.